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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ESTATE OF CLINTON T. FROCK, deceased; and CHARLES L. STRIBLING,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the reduction in petitioners' Railroad Retirement benefits, effected pursuant to 45 U.S.C. §231b(h)(6), violated

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* Clinton T. Frock, petitioner below in No. 81-2187, died on August 28, 1982, twenty-two days after the decision of the Court appealed from and one day after the mandate issued. See Rule 41(a), F.R.App.P. On or about October 12, 1982, a motion was

(cont. p. ii)

the due process clause of the Fifth Amendment by depriving them of procedural due process and by denying them the guarantees of equal protection.

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* cont.

filed in the Court of Appeals to substitute his wife, Loretta Frock, as his personal representative. See Rule 43(a), F.R.App.P; App. D. On October 21, 1982, petitioner's counsel was informed orally by personnel from the clerk's office of the Court of Appeals that the motion had been rejected because that Court no longer has jurisdiction over petitioner Frock's case. No state court probate proceedings have been instituted because there was no property to be probated. Consequently, there is neither an administrator nor an executor appointed to administer his estate.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
Table of Authorities	iv
OPINION BELOW	1
JURISDICTION	1
STATUTES	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	15
I. Section 3(h)(6) conflicts with this court's decision in Logan v. Zimmerman Brush Co. and represents an extraordinary violation of public policy which should be corrected by this Court	15
II. Section 3(h)(6) follows directly from the unconstitutional dependency provisions of the Social Security Act and thereby conflicts with Goldfarb	26
CONCLUSION	35
APPENDICES	

TABLE OF AUTHORITIES

Cases	Page
Califano v. Abbott 430 U.S. 924 (1977)	4
Califano v. Goldfarb 430 U.S. 199 (1977)	passim
Califano v. Jablon 430 U.S. 924 (1977)	4
Califano v. Silbowitz 430 U.S. 924 (1977)	4
Califano v. Yamasaki 442 U.S. 682 (1979)	19
Gebbie v. Chamberlain No. 78-1030 (C.D.Cal., filed March 17, 1978)	5, 6, 22
Gebbie v. U.S. Railroad Retirement Board 631 F.2d 512 (7th Cir. 1980)	passim
Gray Panthers v. Schweiker 652 F.2d 146 (D.C.Cir. 1980)	21
Hisquierdo v. Hisquierdo 439 U.S. 572 (1979)	2
Kelly v. U.S. Railroad Retirement Board 625 F.2d 486 (3d Cir. 1980)	20
Logan v. Zimmerman Brush Co. 102 S.Ct. 1148 (1982)	14, 22, 23, 24, 25, 26
Personnel Administrator of Massachusetts v. Feeney 442 U.S. 256 (1979)	26, 27

Shuff v. U.S. Railroad Retirement Board
No. 80-2791 (7th Cir., April 9, 1981) 9, 12

U.S. Railroad Retirement Board v. Fritz
101 S.Ct. 453 (1980) 2, 3, 16, 28

Statutes

Title 28, United States Code
§1254(1) 1

Title 45, United States Code
§228 et seq. 2
§231 et seq. 2
§231b(h) 3
§231b(h)(1) 3, 33
§231b(h)(2) 3, 33
§231b(h)(3) 1, 3, 5, 16, 33
§231b(h)(4) 1, 3, 5, 16, 33
§231b(h)(6) i, 1, 12, 13
§231b(m) 1, 3, 5
§231f(b)(1) 19, 20
§231f(b)(2) 5
§231f(b)(3) 20
§231g 6
§231n(d) 21
§355(f) 6

Railroad Retirement Act of 1974
§3(h) 3, 12
§3(h)(1) 3
§3(h)(2) 3
§3(h)(3) passim
§3(h)(4) passim
§3(h)(6) passim

Pub.L. No. 97-35, §1118(e)(3),
95 Stat. 357, 631-632 (1981) 11

Pub.L. No. 97-35, §1124, 95 Stat. 357, 639 (1981) 21, 28

Rules

Federal Rules of Appellate Procedure
Rule 41(a) i
Rule 43(a) ii

Federal Rules of Civil Procedure
Rule 23(b)(2) 6

Miscellaneous

127 Cong.Rec. H3980 (June 26, 1981) 30

H.Conf.Rep. No. 97-208, 97th Cong., 1st Sess. (1981) 29

H.Doc. No. 92-350, 92d Cong., 2d Sess. (1972) 15, 31

H.R. No. 3982, §6903(e)(5) 30

S.Rep. No. 93-1163, 93d Cong., 2d Sess. (1974) 16

OPINION BELOW

The opinion of the Court of Appeals on both of the Petitions for Review filed below, Seventh Circuit Nos. 81-2187 and 81-2637, which is reported at 685 F.2d 1041, appears as Appendix A. The final decision of the Railroad Retirement Board in the Appeal of Charles L. Stribling is attached as Appendix B. (There is no final decision of the Board for petitioner Frock.)

JURISDICTION

The decision of the Court of Appeals was filed on August 6, 1982. This petition for certiorari is being filed within 90 days of the filing of that decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES

The following statutes relevant to the consideration of this petition are set out verbatim in Appendix C:

45 U.S.C. §231b(h)(3)
45 U.S.C. §231b(h)(4)
45 U.S.C. §231b(h)(6)
45 U.S.C. §231b(m)

STATEMENT OF THE CASE

1.a. The Railroad Retirement Act of 1974 (the "1974 Act"), 45 U.S.C. §231 et seq., and its predecessor, the Railroad Retirement Act of 1937, 45 U.S.C. §228 et seq., established a system for the payment of benefits to retired railroaders, their dependents, and survivors. See generally Hisquierdo v. Hisquierdo, 439 U.S. 572, 573-574 (1979). Its structure has historically permitted workers insured under both the Railroad Retirement Act and the Social Security Act to recover larger total benefits than they would have received had they worked for the same total period of time under just one Act or the other. See U.S. Railroad Retirement Board v. Fritz, 101 S.Ct. 453, 456 & n.1 (1980). As this payment of so-called dual benefits was a factor in the increasingly heavy financial burden on the Railroad Retirement Fund, Congress undertook to phase out -- but not eliminate -- dual benefits. See id., at 456-457. This was accomplished by continuing to recognize the rights of those already receiving dual benefits and the rights of those whose work history

established them as vested prior to the effective date of the 1974 Act, January 1, 1975. See id., at 457-458.

Achievement of this end was effected through sections 3(h) and 3(m) of the Act, 45 U.S.C. §§231b(h), (m). Pursuant to the latter, railroad retirement benefits are reduced by the amount of Social Security benefits which the retiree receives. That amount is restored, however, pursuant to §3(h), if the individual satisfies the work-related criteria of any of its first four sub-sections, 45 U.S.C. §231b(h)(1)-(4).[1/] See generally Gebbie

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1/ Subsections (1) and (2) are directed at retirees whose entitlement to Social Security benefits is based on their own work records. See Fritz, 101 S.Ct., at 457. Subsections (3) and (4), at issue in this case, concern those whose Social Security eligibility derives from their spouses' work in Social Security-covered employment. See Gebbie v. U.S. Railroad Retirement Board, 631 F.2d 512, 513-514 (7th Cir. 1980). As the Court noted in that case, "both sections [(3) and (4)] raise the same problems of interpretation." Id., at 513 (footnote omitted).

v. U.S. Railroad Retirement Board, 631 F.2d 512, 513 (7th Cir. 1980). In short, Congress' goal was accomplished through a complementery recognition that dual benefits should be ultimately eliminated, but that already vested rights should be preserved and recognized. Id., at 515.

b. In March, 1977, this Court held that provisions of the Social Security Act requiring husbands and widowers, but not wives and widows, to demonstrate "dependency" on the wage earner in order to be eligible for spousal benefits were unconstitutional.[2/] As a consequence, men became equally eligible for Social Security spousal benefits based on the work of their wives and deceased wives.

This Court's Goldfarb determination meant that many male former railroaders were eligible to receive Social Security

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2/ Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430 U.S. 924 (1977); Califano v. Abbott, 430 U.S. 924 (1977). These cases will hereafter be referred to collectively as "Goldfarb."

spousal benefits. The Board was responsible for administering payment of these benefits, 45 U.S.C. §231f(b)(2); it also undertook to reduce railroad retirement benefits by the amount of Social Security benefits that these men were now receiving. 45 U.S.C. §231b(m). The Board also had to consider whether these men were entitled to have their railroad benefits restored to their full amount under 45 U.S.C. §231b(h)(3), (4). Each of those provisions requires that railroad benefits will be increased by the amount to which the former railroader "would have been entitled ... under the provisions of the Social Security Act as in effect on December 31, 1974 ...."

On the basis of the "as in effect language," the Board concluded that these men, estimated at between 20,000 to 50,000,[3/] were not entitled to a restoration of their full railroad benefits. See Gebbie, 631 F.2d, at 514.

3/ Answer to Interrogatory No. 3(a), dated June 19, 1978, in Gebbie v. Chamberlain, No. 78-1030 (C.D.Cal.).

c. Three former railroaders challenged this interpretation in federal district court as contrary to the statute, and, alternatively, unconstitutional. Gebbie v. Chamberlain, No. 78-1030 (C.D. Cal., filed March 17, 1978). The parties stipulated to the facts, including that the three individuals would be entitled to dual benefits but for the Board's interpretation of the challenged provisions. They also stipulated that the case, as alleged by plaintiffs, was proper for certification as a class action under Rule 23(b)(2), F.R.Civ.P., but agreed that formal certification should be witheld pending the court's determination of dispositive motions.

On cross-motions for summary judgment and to dismiss, the district court agreed with defendants, dismissing on the grounds that the plaintiffs had failed to exhaust administrative remedies and that 45 U.S.C. §§231g and 355(f) provided the sole basis for judicial review. The court held that only the appellate courts had jurisdiction to review Board decisions. The three plaintiffs then sought administrative

review, received the inevitable final decision from the Board denying their claims for dual benefits and refusing their request for a classwide determination, and filed a petition for review in the Seventh Circuit. Gebbie v. U.S. Railroad Retirement Board, No. 79-1978 (7th Cir., filed Aug. 27, 1979). Significantly, they styled their joint petition for review as "on behalf of themselves and all others similarly situated," and moved for class certification. That motion was denied by a single judge of the Court, who stated that the appellate court "was an inappropriate forum in which to request class certification." Gebbie v. U.S. Railroad Retirement Board, No. 79-1978 (7th Cir., order of Oct. 17, 1979). In their briefs on the merits, however, petitioners reasserted their class claims, and the issue was discussed at oral argument.

In its decision, the Court of Appeals agreed with petitioners that the Board was misinterpreting the "as in effect" language:

> "It is difficult for the Board to take the position that Congress intended this language to have the extraordinary effect of insulating the Social Security component of Railroad Retirement benefits against the 'change' brought about by Goldfarb, for an unconstitutional law is 'in legal contemplation, as inoperative as though it had never passed.'" Gebbie, 631 F.2d, at 516 (citations omitted).

The Court concluded that, as the wives of the petitioners had satisfied all of the work-related requirements to render their husbands eligible for Social Security spousal benefits by the effective date of the 1974 Act, they were vested at that time and were entitled to dual benefits. Id., at 516.

The Court again refused, however, to certify a class, concluding that "this court is not an appropriate forum for such an action." Id., at 516 n.9.

The Board did not seek review of the decision, and restored the three beneficiaries to dual benefit status, including payment of those benefits previously offset. The Board refused, however, to pay

any other affected former railroaders, asserting that its obligations under Gebbie were limited to the three individual petitioners. Thus, despite the Seventh Circuit's determination that its interpretation was wrong, the Board continued to apply subsections 3(h)(3) and (4) to deny dual benefits to the remaining thousands of men in this situation.[4/]

2.a. Clinton Frock worked for 44 years for the St. Louis-San Francisco Railroad. He retired in 1968 at the age of 65; he was 79 years old when he died. He was eligible for and received an annuity under the Railroad Retirement Act of 1974.

His wife worked for 20 years in Social Security-covered employment, and was eligible for and received a benefit under the Social Security Act. She is now 72 years old.

4/ One other individual obtained a final decision from the Board denying his claim, filed a petition for review with the Seventh Circuit, and received an order requiring the Board to pay him dual benefits. Shuff v. U.S. Railroad Retirement Board, No. 80-2791 (7th Cir., April 9, 1981).

After the Goldfarb decision, Mr. Frock received a notice from the Board regarding his future receipt of Social Security and Railroad Retirement benefits. The notice indicated that he would "probably continue to receive the same total amount each month as you did before you became entitled to Social Security benefits." In February, 1981, after the Gebbie decision was final, Mr. Frock requested the Board to reinstate his full benefits; this request was denied, with the Board's attorney stating that the "Board is not applying the Gebbie case on a class basis." Mr. Frock then filed a petition for review on July 27, 1981.

b. Charles L. Stribling worked in the railroad industry for 36 years for railroad retirement purposes, retiring in 1974 from the Seaboard Coastline Railroad Company at the age of 65. He is now 73 years of age. His wife worked for more than 20 years in Social Security covered employment, and was eligible for and received a benefit under the Social Security Act. She is now 72 years old.

By letter dated December 28, 1978, Mr. Stribling was notified regarding the effect of Goldfarb and the Board's interpretation of section 3(h). He timely filed an appeal from the decision of the Board's Bureau of Retirement Claims on October 11, 1979; on May 27, 1980, the referee affirmed the initial decision. He appealed that decision to the Board on September 22, 1980, and contended, inter alia, that the Gebbie decision was controlling. Ten months later, in a letter dated July 27, 1981, the Board reaffirmed the denial of his claim, stating that it was adhering to its policy of denying dual benefits to persons such as Mr. Stribling and that it would not follow the decision reached in Gebbie. See App. B. He filed his petition for review on October 15, 1981.

3. On August 13, 1981, after Mr. Frock had filed his petition for review and after Mr. Stribling had received his final decision from the Board, President Reagan signed the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub.L. No. 97-35, 95 Stat. 357 (1981). Section 1118(e)(3) of the OBRA, 95 Stat. 631-632, added a new subdivision to

subsection 3(h) of the Railroad Retirement Act. That new subdivision, codified at 45 U.S.C. §231b(h)(6), reads in its entirety:

> "No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."

But for this amendment to the statute, petitioners would have been entitled to an order from the Court of Appeals reversing the Board's denials of their claims for dual benefits. See, e.g., Shuff, supra. Because the Court of Appeals did not rule on Mr. Frock's petition prior to August 13, 1981, and because the Board did not rule favorably on Mr. Stribling's claim prior to that date, the effect of §3(h)(6) was to deprive them of benefits to which, as the Court of Appeals had previously determined in Gebbie, they, and thousands of others, were entitled. The issue raised by their petitions, therefore, became the application and constitutionality of subdivision 3(h)(6).

In its decision, the Court of Appeals

rejected all of petitioner's arguments. First, it held that the language of 3(h)(6) explicitly precluded payment of dual benefits "unless an individual has been determined to be eligible by the date of enactment." App. A, at 15A (emphasis in original). A "specific determination of entitlement" before August 13, 1981 was necessary. Ibid. Since Gebbie was not certified as a class action, the Board was not bound to apply that case to other than the individuals involved. Id., at 16A. Moreover, the Court held, the failure of the Board to seek review of Gebbie in this Court did "not have the effect of setting a nationwide agency standard." Ibid. Consequently, "the agency was bound to comply with this court's decision only with regard to" the Gebbie petitioners. Id. at 19A.

The Court also rejected petitioner's argument that the new divesting provision violated due process: "To condition dual benefits upon when entitlement is determined does not seem to us to be so unreasonable as to constitute a denial of due process." Id., at 21A. Noting that, in its judgment, petitioners had offered

no authority directly on point for their contentions, the Court found a recent decision by this Court inapposite. Unlike that case, Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), this was an instance, the Court observed, where "there is no procedure which ... was denied...." Id., at

Finally, the Court rejected petitioner's claims that the provision violated the guarantees of equal protection by "grandfathering in" the Social Security Act provisions found unconstitutional in Goldfarb. Section 3(h)(6) was facially gender-neutral, the Court reasoned, App. A, at 26A, and was "clearly explainable in terms of a non-discriminatory purpose." Id., at 29A. Therefore, it lacked any "invidious gender-based discriminatory purpose." Id., at 31A-32A.

The Court of Appeals thus affirmed the Board's decision to deny dual benefits, upholding subsection 3(h)(6) of the Act.

REASONS FOR GRANTING THE WRIT

I. SECTION 3(h)(6) CONFLICTS WITH THIS COURT'S DECISION IN LOGAN v. ZIMMERMAN BRUSH CO. AND REPRESENTS AN EXTRAORDINARY VIOLATION OF PUBLIC POLICY WHICH SHOULD BE CORRECTED BY THIS COURT

In restructuring the Railroad Retirement Act in 1974, Congress had several options for resolving the perceived difficulties created by the numerous railroaders whose doubly-insured status entitled them to dual benefits.[5/] It could have eliminated dual benefits altogether. Or it could have limited them to individuals already receiving them. It chose, instead, to rest eligibility on vested status and on

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5/ By the year 2000, it is estimated that nearly 48 per cent of all railroaders will have sufficient credits to be covered under both Acts, and would therefore have been eligible for dual benefits under the pre-1974 Act. H.Doc. No. 92-350, 92d Cong., 2d Sess. 22 (1972). Consequently, the issue was not one involving a few isolated railroaders with a "lucky" work background. Dual coverage was and is a common factor for railroaders and former railroaders.

other indicia demonstrating a special relationship with the railroad industry. See S.Rep. No. 93-1163, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Admin. News 5702, 5710, 5711; see also Fritz, 101 S.Ct., at 461.

Furthermore, Congress could have maintained dual benefits only for former workers who themselves had worked sufficiently to be covered under both Acts, eliminating dual benefit coverage for those whose Social Security entitlement derived from their spouses' work efforts. It did not select this option either, deciding instead, via 45 U.S.C. §231b (h)(3), (4) to recognize the Social Security coverage of these former railroaders as well.

Implicit in Congress' decisions, therefore, was a recognition that, once a railroader and spouse had satisfied appropriate work-related criteria, they were entitled to enjoy the full range of benefits available from the Social Security and Railroad Retirement Acts. Whatever savings had to be effected, Congress determined, would derive from those whose entitlement had not yet vested. Consequently, as the starting point for analysis, there must be

the recognition that Congress sought to protect vested rights and that the men divested by section 3(h)(6) are no less deserving of having their rights protected than are any others eligible for dual benefits. See Gebbie, 631 F.2d, at 516.

In light of this background, the actions of the Board, and of Congress in passing section 3(h)(6), take on special significance. This is not an instance where Congress has simply reduced benefits or eliminated a program. In this case, Congress has taken advantage of the Board's demonstrated stubbornness, coupled with the procedural peculiarities of the Railroad Retirement Act, to divest one classification, consisting of thousands of men, of benefits which they, or their representatives, have been seeking for years. The violation of due process in this instance is extraordinary precisely because the statute utilized the powerlessness of the affected claimants, and the intransigence of the responsible agency, to divest them of benefits to which they were already entitled.

Petitioners Frock and Stribling are

members of a class which, as the Board agreed four years ago, should have been certified. Because of a strict reading of the jurisdictional provisions of the Act, however, the issue could not be joined on the merits in the district court. On the other side of the coin, the inability to obtain class certification in an appellate court stymied the second effort to resolve the substantive issue on a classwide basis. The next step in the claimants' ordeal was the Board's refusal to apply the interpretation mandated by an appellate court. Petitioners' frustrating effort received its final blow in the passage of section 3(h)(6).

Significantly, that provision does not attempt to "correct" subsections 3(h)(3) and (4); rather, it utilizes the Board's past failure to correctly apply the statute as a means to negate vested entitlement.[6/]

6/ The Board's refusal to correctly apply the statute contradicts its statutory obligation: "The Board shall have and exercise all the duties and powers necessary to administer this subchapter. The Board shall take such steps as may be necessary (cont. p. 19)

Congress eliminated benefits not for those who had failed to meet certain work-related criteria, or who were not entitled; instead, it hinged eligibility on whether entitlement had been determined. The reasons that entitlement had not been determined were beyond the control of the claimants. These reasons are: (1) procedural hurdles precluding class certification; and (2) the Board's refusal to apply the statute correctly. Men affected by the challenged provision made every conceivable effort to obtain full and final review of their claims, but were prevented by procedural problems beyond their control.

Still, the court below states that

6/ cont.

to enforce such subchapter and make awards and certify payments." 45 U.S.C. §231f(b)(1). This mandatory duty requires the Board to take affirmative steps, and does not permit it to employ only those procedures and interpretations with which it agrees; the Board's obligation is to carry out the legislative mandate. Accord Califano v. Yamasaki, 442 U.S. 682, 693-694 & n.9 (1979).

"condition[ing] dual benefits upon when entitlement is determined does not seem to us to be so unreasonable as to constitute a denial of due process." App. A, at 21A. Yet, the Court would undoubtedly agree that, at some point, the Board has an obligation to make that determination. The statute is explicit on this point. See 45 U.S.C. §231f(b)(1), (3). Moreover, the Board itself has conceded that delay in ruling on a claim is itself a violation of due process. Kelly v. U.S. Railroad Retirement Board, 625 F.2d 486, 491 (3d Cir. 1980). If delay is a violation of due process, then the outright refusal to apply a statute correctly must represent a similar violation. And, where that refusal receives institutionalized approval by incorporation into a later statute, then the due process violation is enhanced.

Significantly, section 3(h)(6) is also not relevant to the saving of finite resources, as the Court of Appeals stated. App. A, at 22A. Congress dealt with that issue separately, by setting a limit on the total amount of dual benefits that can be paid out in a given year. That amount is

established and allocated separately by Congress each year, and is not tied to the general fund. Consequently, the number of dual beneficiaries cannot affect the fiscal soundness of the system. See 45 U.S.C. §231n(d), as added by Pub.L. No. 97-35, §1124, 95 Stat. 639 (1981).

The Court below noted that petitioners were unable to cite explicit support for their position. App. A, at 23A. Petitioners readily concede that there is no precedent on this issue; research has disclosed no previous instance when Congress divested beneficiaries by incorporating the unconscionable action of the responsible agency. As another appellate court observed in a different context involving the procedural irregularities of a federal agency: "[This] resembles more a scene from Kafka than a constitutional process." Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C.Cir. 1980).[7/]

7/ The effect of §3(h)(6) on Mr. Stribling assumes a particularly ironic tone in light of the Court's determination below that exhaustion was futile and

(cont. p. 22)

Petitioners did raise to the Court of Appeals, however, this Court's recent decision in Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982). The decision below rejected its applicability on the grounds that that case involved the failure to provide a statutorily required procedure, while, in this instance, "there is no procedure which the petitioners claim was denied them." App. A, at 23A. The Court has misconstrued petitioners' position, however, and misunderstood the relevance of Logan to this situation.

7/ cont.

unnecessary. See App. A, at 11A. Had Mr. Stribling taken the short-cut, and sought judicial review immediately, he would have undoubtedly had his entitlement determined prior to August 13, 1981. But because he reasonably followed the express statutory requirement of exhaustion, which one court had determined was a jurisdictional predicate to judicial review, Gebbie v. Chamberlain, supra, he did not receive a final decision from the Board (pre-ordained to be adverse) until just a few weeks before the passage of section 3(h)(6) -- and nearly two years after he contested the initial decision. In short, the administrative review procedure designed to guarantee that claimants receive due process was itself responsible for his divestment.

Logan involved the one-time failure of a state officer to hold a hearing within the statutorily mandated time period. The instant situation is on a considerably larger scale, but the effect is essentially the same. The petitioners in this case were also effectively denied a hearing. First, the Board refused to comply with its obligation to award benefits to beneficiaries, by ignoring the mandate of subsections 3(h)(3) and (4). Secondly, Congress institutionalized that action by establishing the date of the determination of entitlement -- a determination which the responsible agency refused to make -- as the definitive factor for the payment of benefits.

Logan involved one person deprived of a hearing because of negligence. This issue involves thousands of men deprived of vested benefits because of an affirmative decision by the responsible agency not to pay benefits, coupled with a legislative determination that that action -- the decision not to follow the statute -- will itself serve as the basis for divestment. The petitioners here, like Mr. Logan, were

deprived of a procedure: the right to have their benefits determined pursuant to statute.

If, in Logan, officials of the Illinois Fair Employment Practices Commission had decided, perhaps because of a reduced budget, that an arbitrary number of hearings would not be scheduled within the statutorily mandated time period, thereby depriving the selected individuals of a hearing, would that have been any less a violation of due process than the single incidence of negligence which did occur? Yet, that, in essence, is what happened in this case, with the additionally egregious factor that the decision of the agency officials not to provide the procedure (i.e., a determination of entitlement) mandated by statute was retroactively legitimized by Congress.

Logan directs public officials to provide the procedures which the statute requires, and precludes them from denying those procedures for reasons unrelated to the actions of the claimant. In this case, on a broad, institutional basis, public officials have refused to comply with their

statutory mandate -- through no fault of the petitioners, who met all of the eligibility conditions for vested entitlement and who have been seeking a determination of entitlement for years. That Congress has incorporated the actions of these officials as a means to forever deprive these petitioners of their benefits does not validate that action. The statutory divestment of an entitlement, due solely to the intentional refusal of public officials to comply with a statutory mandate, does not distinguish this case from Logan; it represents instead a more egregious version of it.

The Court should grant the petition, therefore, in order to review the unique and exceptional action of Congress in repudiating a vested entitlement by the creation of a retroactive eligibility condition which was beyond the control of the claimants, and which negated vested entitlement by institutionalizing the improper action of a federal agency. Furthermore, the decision of the Court of Appeals significantly conflicts with a

recent decision of this Court.[8/]

II. SECTION 3(h)(6) FOLLOWS DIRECTLY FROM THE UNCONSTITUTIONAL DEPENDENCY PROVISIONS OF THE SOCIAL SECURITY ACT AND THEREBY CONFLICTS WITH GOLDFARB

The Court below determined that the challenged provision was facially gender-neutral, App. A, at 26A, and applied the analysis outlined in Personnel Administrator of Massachusetts v. Feeney, 442 U.S.

8/ In addition, section 3(h)(6) creates two classifications of otherwise eligible dual beneficiaries: those whose entitlement was determined before August 13, 1981 and those determined later. The disfavored classification is deprived of a vested entitlement for reasons unrelated to the purpose of the Railroad Retirement Act; the differential treatment discriminates for no valid reason and thus fails to satisfy the rational basis test. Again, as in Logan, the use of an arbitrary procedural dividing line, over which claimants have no control, to divest claimants of their established rights, is violative of equal protection guarantees. See Logan, 102 S.Ct., at 1159 (Blackmun, J., separate plurality opinion on equal protection), and 1161-1162 (Powell, J., concurring in plurality opinion on equal protection).

256 (1979), to conclude the provision did not discriminate on the basis of sex. But this case is factually distinguishable from Feeney, and that analysis has little or no bearing. Unlike that case, this is an instance in which the legislature has intentionally sought to camouflage a gender-based classificatory scheme.

The Board's interpretation of sections 3(h)(3) and (4) incorporated the dependency provisions of the Social Security Act and is therefore unconstitutional. The Court of Appeals did not expressly determine that in Gebbie, but it strongly implied that the Board's interpretation was unconstitutional. The Court below recognized as much: "[T]he [Gebbie] court suggested that this application was contrary to Goldfarb." App. A, at 25A.

Thus, in the absence of 3(h)(6), the statute would unquestionably be unconstitutional. The Board argued, and the Court of Appeals agreed, however, that 3(h)(6) effectively purges those provisions of their gender-based taint by creating a scheme based solely on the date on which entitlement was determined. This approach

however, ignores the explicit purpose and actual effect of 3(h)(6) and views that section as if it were in a vacuum, unrelated to sections 3(h)(3) and (4) and the unconstitutional provisions of the Social Security Act. In effect, it allows the blatantly unconstitutional treatment of intended beneficiaries of Goldfarb to be swept under the rug.

The Court of Appeals urges that the purpose of 3(h)(6) was to protect the fiscal soundness of the railroad fund, citing U.S. Railroad Retirement Board v. Fritz, 101 S.Ct. 453 (1980). App. A, at 31A. While it is correct that that was the purpose of the provisions challenged in Fritz, see 101 S.Ct., at 456, that was not the purpose of this provision. As previously noted, another part of OBRA, section 1124, established a separate fund for the payment of dual benefits, for which Congress makes a separate appropriation each year, and that provision operates to prevent dual benefits from adversely affecting the Railroad Retirement Fund. Regardless of whether the class of men affected by 3(h)(6) receives

benefits, there will be no impact on the Fund.

The legislative history discloses, however, that the express purpose of section 3(h)(6) was to foreclose the payment of dual benefits to the men who were eligible under the Gebbie analysis. H.Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 862-863 (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 1010, 1225-1226. That discussion leaves no doubt that section 3(h)(6) had one goal: to divest those men who, in the opinion of the Board, were never entitled to benefits in the first place under 3(h)(3) or (4). These men are, of course, exactly the same men who were expected to benefit from Goldfarb. The effort was undertaken by couching 3(h)(6) so that the divestiture was premised on the date of entitlement, not on the sex of the worker or his spouse. But this approach was merely camouflage for the true purpose and effect of 3(h)(6).[8/]

8/ That 3(h)(6) was intended to perpetuate unconstitutional provisions while appearing gender-neutral is apparent from its original version, which was so

(cont. p. 30)

The Seventh Circuit further concluded that section 3(h)(6) did not in fact discriminate on the basis of sex because "[t]he class of persons who will be excluded from dual benefits under this section will be composed of men and women. Similarly, the class of persons who will receive benefits will be comprised of men and women." App. A, at 30A (footnote omitted). This conclusion, however, ignores reality and controlling legal precedent.

The Court first notes that there are men not adversely affected by §3(h)(6); they are those who met the dependency test

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8/ cont.

blatantly unconstitutional in its reliance on the Social Security Act provisions that it was rewritten to eliminate the blemishes. It states: "Notwithstanding any other provision of law, no amount shall be payable under subdivision (3) or (4) of this subsection to any individual who does not meet the requirements for a wife's, husband's, widow's, or widower's benefit under the Social Security Act as it was in effect and being administered on December 31, 1974, unless such amount was awarded prior to June 1, 1981." H.R. No. 3982, §6903(e)(5), reprinted in 127 Cong.Rec. H3980 (June 26, 1981).

and those "who successfully challenged the Board's interpretation in court." App. A, at 30A n.16. It is entirely irrelevant that some men satisfied the unconstitutional dependency provision; the same was true in Goldfarb, and that was not a saving factor for the provision there challenged. And it is ludicrous to premise the legitimacy of §3(h)(6) on the fact that four men were able to press their claims successfully prior to the effective date of the provision. Surely the fact that some people were able to force the Board to interpret the statute correctly does not form the basis for upholding a provision which incorporates the Board's incorrect and unconstitutional interpretation of the statute.

It is equally inaccurate to premise its legitimacy on the fact that some women will be deprived of dual benefits pursuant to section 3(h)(6). The percentage of women who will be affected by this section -- those whose entitlement was not determined by August 13, 1981 -- is so small, so minuscule, as to be de minimis. If the structure settled upon by Congress to

accomplish the divestment of the men in the putative Gebbie class can satisfy equal protection guarantees merely by having an adverse effect on a tiny percentage of women, then virtually any otherwise discriminatory provision could be saved from invalidation by the expediency of including a few of the other sex among those affected.

First, only 6.6 per cent of all railroaders are women. H.Doc. No. 92-350, supra, at 87-88. Secondly, that number is significantly reduced because, prior to August 13, 1981, all otherwise eligible women would have had their entitlement determined by the Board, for the Board found women eligible for dual benefits under sections 3(h)(3), (4) without regard to dependency. Thus, the only women deprived of dual benefits by 3(h)(6) are those who retired either after that date, or so shortly before it that their entitlement could not be determined in time. Significantly, the further in the future from January 1, 1975 -- the effective date of the 1974 Act and the date by which all railroaders seeking dual benefits had to have met the vesting

requirements under the Social Security and Railroad Retirement Acts, see 45 U.S.C. §231b(h)(1)-(4) -- the fewer the number of recipients who will be retiring with sufficient credits to be vested under both Acts. Consequently, most of those who were or should have been eligible under §3(h)(3), (4) had already retired before implementation of §3(h)(6), so that the overwhelming percentage of women potentially affected by §3(h)(6) had retired and had had their entitlement determined before they could be affected by that provision.

In sum, there was a finite number of railroaders who, as of December 31, 1974, could possibly retire with dual benefits based on the Social Security insured status of their spouses. Only one in sixteen of this finite group was female. In addition, in the more than six years between the effective date of 3(h)(3) and that of 3(h)(6), many of these women retired and were found eligible. Thus, in the period after August 13, 1981, an increasingly smaller percentage of the finite group of women vested on December 31, 1974 are affected.

The purpose of section 3(h)(6) was to

negate the entitlement of men which Gebbie had conclusively established under sections 3(h)(3) and (4). Under the Board's interpretation, those latter sections were unconstitutional due to their incorporation of the invalid dependency provisions of the Social Security Act. Section 3(h)(6) further incorporates the Board's interpretation of those sections; its effect on a de minimis percentage of women cannot disguise its history, purpose and effect. Section 3(h)(6) is merely one more layer of camouflage over the provisions of the Social Security Act which this Court found unconstitutional five years ago.

The Court below has, in effect, upheld a provision which was invalidated in the Goldfarb cases. That decision should be reviewed.

CONCLUSION

For the reasons presented, a writ should issue to review the decision of the Seventh Circuit.

Respectfully submitted,

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